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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 25

CLAUDE DENNIS, *Petitioner*,

v.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, a corporation, *Respondent*.

BRIEF OF RESPONDENT

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On Writ of Certiorari to the Supreme Court of Utah

Petition for Certiorari Filed October 18, 1962
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 535

CLAUDE DENNIS, *Petitioner*,

v.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, a corporation, *Respondent*.

BRIEF OF RESPONDENT

STATEMENT OF THE CASE

Petitioner's statement of the case is substantially correct. There is, however, some inaccuracy and omission which requires a brief statement by respondent.

Petitioner, a section hand of 16 years experience, was a member of a crew called to work to repair an open joint (separation of the rails) on defendant's main line. Petitioner did not consider the repair to be of an emergency character (R. 44, 45). The officials of the railroad company considered the open joint to require an immediate emer-

gency repair operation to permanently secure the open rails (R. 127). Respondent's concern for delay in the work was threat of derailment and interference with train schedules pending final repair (R. 127-129).

All available sectionmen in the area were called to assist in the repair. The four-man crew which petitioner was working with on the night in question was as large a crew as ever employed in the closing of an open joint (R. 130-131).

Petitioner testified that when he was called to work about 5:00 o'clock p.m., it was "awful cold" and that "the wind was blowing pretty hard" (R. 25). It was not uncommon for petitioner to be called to work on such assignments (R. 69. See Exhibit 1-D, R. 52, 138-142). He knew that he would be exposed to the weather and provided clothing which he considered adequate to protect him. In this regard he testified: (R. 69)

> "Q . . . You sectionmen accept the responsibility of clothing yourself for the kind of weather you are exposed to on the particular railroad job?
>
> A. We furnish our own clothes, yes."

(R. 56)

> "Q. And that is the custom and the practice on the railroad for sectionmen to furnish all of their own clothing?
>
> A. Yes.
>
> Q. So you yourself provide yourself with what you think is sufficient to protect you against the cold?
>
> A. Yes, sir."

Petitioner was the only member of the crew who wore canvas gloves in lieu of woolen mittens and who failed to wear overshoes (R. 55). He was the only one who suffered frostbite.

In light most favorable to petitioner the evidence shows that the crew was called to work about 5:00 p.m., arrived at the repair site about 5:45 p.m. and left for Green River about 4:00 a.m. the following morning, arriving about 5:00 a.m., indicating working time at the repair site of approximately 10 hours (R. 37, 63). Petitioner spent part of the time at the repair site in the heated cab of the truck. [Petitioner said that he was in the truck not to exceed 30 minutes (R. 64), and his three fellow workmen testified that he was in the cab from midnight until the job was completed (R. 90, 95, 104).]

Fires were built at the repair site to enable the crew to warm themselves if they became cold. With respect to this petitioner testified: (R. 68)

> "Q. Now there was no one who of course prevented you from going and warming yourself by this fire at any time you wanted, was there, Mr. Dennis?
>
> A. We generally took turns at it.
>
> Q. You could go over there if you got cold and go by the fire if you wanted, could you not?
>
> A. For what good you could get out of it, yes.
>
> Q. *And of course no one knew better than you when you were cold enough and wanted to go over to the fire?*
>
> A. *That's right.*"

The foreman testified that whenever the men felt too cold, they went to the fire (R. 113). When trains passed, the crew went to the fire together (R. 68).

There is no evidence whatever that petitioner made any request for clothing; that he asked for permission to obtain additional clothing himself, or that he made any request to warm himself by the fire or in the cab of the truck which was not granted.

Petitioner testified that the crew went over to the fire together about midnight. He said, "I laid the wrench down there and when I did these two fingers were clamped shut and I had to pull them apart like that before I could get my glove off" (R. 35-36). At that time petitioner commented, "It looks like my hand's frozen to that wrench" (R. 36). Petitioner said that about midnight he felt a "burning, tingling sensation" in his fingers (R. 36). He did not report this to the foreman or his fellow workers. The foreman testified that petitioner complained of the cold around midnight and that he was told to get into the cab of the truck (R. 104). Petitioner denied that he got into the truck at midnight, but he did not refute the testimony of the foreman that he was told to do so.

In a written statement given by petitioner following the accident, he stated that, "It was not unusual for us to be called out for this kind of work in cold weather. . . . Many times we worked overtime for longer periods of time than this one, and also were called for such work in even colder weather than this time, but previously I never had any trouble resulting from the cold weather. . . . The only thing I can blame this freezing of my fingers on was the weather." (Exhibit 1-D, R. 52, 138-142).

The expert witness called by petitioner testified that when a person's body temperature is reduced, he is more subject to frostbite and that the preventive for frostbite is the correct type and sufficient amount of clothing (R. 75-76).

Petitioner's injury consisted of the loss of one finger and part of another on his left hand. The jury assessed his damages at $20,000.00 and diminished the award by one-half for contributory negligence (R. 12).

The trial court denied respondent's motions for directed verdict and for judgment n.o.v. (R. 11, 13, 14, 133). The Utah Supreme Court reversed.

SUMMARY OF ARGUMENT

The decision of the Utah Supreme Court is in accordance with the evidence and the law.

I.

The respondent was not negligent. Railroads are not charged with injuries resulting from the "usual risks" of employment which cannot be eliminated through the exercise of reasonable care. Exposure to weather is such a risk. Neither prevailing custom nor case law requires respondent to clothe petitioner against the weather.

The petitioner was not unnecessarily or unreasonably exposed to the cold weather. The rails were separated on respondent's main line, and repair operations had to be undertaken before any traffic could travel over the line. Permanent repair operations were essential before rail traffic could move with safety and in accordance with published time schedules. All available help was provided in performing the emergency repair work.

Respondent's foreman acted in accordance with the requirements of due care. Fires were built at the repair site to provide warmth against the cold. Employees were permitted to go to the fire when they felt the need of it. Breaks were taken when trains arrived at the repair site, and in addition the sectionmen took regular turns at the fire. Petitioner made only one complaint about the cold, at which time he was told to get into the heated cab of a truck. The foreman's action in supervising the work was in accordance with the requirements of the occasion in accomplishing the repair work as soon as possible with as much help as was available and with ample protection afforded for the workmen.

II.

Petitioner's own conduct (negligent or otherwise) was the sole cause of the accident. Petitioner knew his own need for clothing and for the warmth of the fire. He failed to provide adequate clothing. His exposure to the cold was a matter entirely within his own control. He had apparent notice of his own peril when he felt a tingling and burning sensation in his fingers, but he failed to report this condition to the foreman and continued his work to the end of the shift without complaint.

III.

The Utah Supreme Court did not revive the doctrine of assumed risk. Nothing in the opinion of the Court even remotely suggests that petitioner's recovery is barred by reason of his assumption of any risk presented by negligence of the respondent.

ARGUMENT

POINT I.

THE SUPREME COURT OF UTAH DID NOT ERR IN HOLDING THAT THERE WAS NO EVIDENCE OF EMPLOYER NEGLIGENCE.

(1) The cases do not charge railroads for injury caused by exposure to weather in the absence of specific proof of negligence.

In his statement given to the railroad company petitioner explains the cause of the accident as follows: (Exhibit 1-D, R. 52, 141)

> "The only thing I can blame this freezing of my fingers on was the weather."

Petitioner's statement calls to mind the statement of Mr. Justice Frankfurter in *Tiller v. Atlantic Coast Line Railroad Company*, 318 U.S. 54, 63 Sup. Ct. 444, wherein it is said:

> "The carrier is not . . . to be charged with those injuries which result from the 'usual risks' incident to employment on railroads—risks which cannot be eliminated through the carrier's exercise of reasonable care."

The decisions of this Court still require an evidentiary basis for a finding of employer negligence. *Herdman v. Penn. R. R. Co.*, 352 U.S. 518, 77 Sup. Ct. 455 (1957); *Brady v. Southern R. Co.*, 320 U.S. 476, 645 Sup. Ct. 233 (1943); *Eckenrode v. Penn R. Co.*, 335 U.S. 329, 69 Sup. Ct. 91 (1948).

Counsel for petitioner have cited two cases dealing with railroad liability for exposure to weather. *Anderson v. Atchison T. & S. F. R. Co.*, 333 U.S. 821, 68 Sup. Ct. 854, and *Hayes v. New York Central R. Co.*, 311 F.2d 198. The evidence in the *Anderson* case disclosed that the railroad employee, a train conductor, fell from a train and injured himself. In his helpless condition he was exposed to bitter cold weather over a period of several hours which resulted in his death. The negligence on which liability was predicated was the failure of the train employees to make any effort of any kind to save him from his position of helpless peril. The case has on bearing on the facts of the instant case. In the *Hayes* case a temporary employee suffered frostbite while shoveling snow for a period of 27 hours. The evidence disclosed, to the satisfaction of the trial judge and the reviewing court, that the railroad assured the employee that he could safely embark upon his work without protection for his feet against the snow and weather conditions and effectively *prevented* the employee from securing a pair of boots before he commenced his work. The negligence in the *Hayes* case was predicated on the conduct

of the railroad in actually preventing the employee from taking action to adequately clothe himself and in assuring him that his existing clothing was sufficient.

As can be readily seen, neither of the above cases is precedent for a holding that employer negligence may be predicated solely on proof of exposure to weather in the course of railroad work.

As will be shown, the evidence in the case at bar demonstrates that petitioner is an experienced sectionman. His exposure to the weather was in the course of ordinary, usual and necessary railroad work. The railroad exercised no control over petitioner's clothing. He retained full control over his own attire. Fires were provided for petitioner's use at will. Assuming that petitioner took proper care to clothe himself adequately and to avail himself of opportunity for warmth, it follows that climatic conditions constituted the sole cause of petitioner's injury. We think that the opinion of the Fifth Circuit properly stated the law in *Fort Worth & Denver R. Co. v. Smith*, 206 F.2d 667, where it was said: (206 F.2d 669)

> "It is a general rule that a railway company is not liable to its employees for injuries resulting from climatic conditions. . . ."

(2) Respondent has no duty to provide clothing to its employees to guard them against weather conditions.

Petitioner's injury resulted from a combination of cold weather, inadequate clothing and exposure. Respondent has no influence over weather conditions. Exposure to heat and cold is therefore a necessary part of railroad operations.

No technical knowledge or special equipment is required in clothing one's self to protect against the weather.

In the case at bar the petitioner is a railroad man of 16 years' experience. These 16 years of experience involve work in the same area and of the same character as was being performed on the night of the injury. Petitioner's own testimony shows recognition that he is best able to determine his own needs.

Petitioner's counsel have cited cases requiring railroads to exercise reasonable care to provide special safety equipment such as goggles and respirators where the circumstances of a particular type of work give rise to a special hazard (Page 24, Petitioner's Brief). Such cases are not in point here. We find no cases requiring the employer to provide protective clothing against the usual and ordinary risk presented by exposure to weather, and it has been held that protective clothing need not be furnished to railroad employees in the performance of usual and ordinary tasks not involving special risks created by the employer. *Wolfe v. Henwood*, 162 F.2d 998 (8th Cir. 1947).

In the case at bar neither party assumed that the railroad had any duty (or right) with respect to the supervision of petitioner's attire. In line with the prevailing custom and practice, petitioner assumed the right and the responsibility for clothing himself. He did not rely on the respondent. The evidence furnishes no basis for a conclusion that the railroad had a duty to clothe petitioner against the weather.

(3) The respondent was not negligent in proceeding with immediate repair of the open rails or in failing to provide sufficient help to accomplish the work.

Exposure to weather is a necessary incident of railroading. Railroads are operated and must be maintained under all weather conditions. Maintenance and repair problems arise night and day, winter and summer.

The open joint reported on January 2, 1962, was not an unusual or an extraordinary occurrence. In his statement petitioner said, "It was not unusual for us to be called out for this kind of work in cold weather and I had been called out for just such work lots of times" (Exhibit 1-D, R. 52, 139). The open joint did require immediate attention. At least temporary repair had to be made before any traffic could pass. A train was waiting when petitioner's crew arrived at the scene.

Petitioner's counsel contend that petitioner was unnecessarily and unreasonably exposed to risk of frostbite by the railroad's decision to proceed with immediate nighttime repair of the open rails. It is the apparent position of counsel for petitioner that in the exercise of due care the railroad was required to defer the repair operation until the next day, notwithstanding the fact (admitted by petitioner himself) that six trains would pass over the open joint during the nighttime (R. 45) carrying passengers and property between Denver and Salt Lake City. Respondent submits that this position is wholly untenable.

The use of dutchman, while adequate as a temporary measure to allow passage of trains at reduced speed during repair operations, does not eliminate the danger to life and property attendant an unsecured rail. The tendency of the opening between adjoining rails to increase and the possibility of the loose dutchman turning out of alignment (R. 127-129) present ample warrant for the policy of the railroad industry to repair an open joint as soon as possible. Under the circumstances, had an accident occurred by reason of delay in the closure of the joint, respondent would almost certainly have been found negligent. Further, the delay in repair would have a serious effect upon the ability of the railroad to meet its published time schedules. This fact is not is dispute.

Assume that there is an honest difference of opinion between petitioner (a switchman) and the railroad as to the importance of immediate repair in the interest of public safety and convenience. There is nothing whatever in the record to warrant an inference that the railroad did not act in good faith or in line with what is considered to be its duty. Under these circumstances, it is submitted that petitioner's judgment as to the proper policy to be followed by railroad management should not be the basis of a standard. Petitioner's testimony that the repair could have waited furnishes no basis for charging the railroad with negligence in proceeding with the repair work.

Nor is there merit in the contention that adequate help was not furnished. It is true that there were two section crews in the remote area of respondent's line near Green River. Two open joints were reported on the same night, however, and a crew was dispatched to close each joint (R. 121, 122). Petitioner sought to prove availability of an additional railroad worker, one Delmar Powell. The evidence is that Powell was called by the foreman but could not be contacted (R. 101, 112). Furthermore, the undisputed evidence is that the four-man crew who worked on the joint in this instance was as large a crew as ever required or employed to reduce an open joint and that in isolated areas it was common to do such work with two or three men (R. 130, 131).

Counsel for petitioner cite five cases in support of their contention that the State Supreme Court erred in rejecting the plea of insufficient help (Page 25, Petitioner's Brief). *Blair v. Baltimore & O. R. Co.*, 323 U.S. 600, 65 Sup. Ct. 545; *Bourquet v. Atchison T. & S. F. R. Co.*, 65 N.M. 207, 334 P.2d 112; *Davis v. Virginian R. Co.*, 361 U.S. 354, 80 Sup. Ct. 387; *Southern Railway Company v. Welch*, 247 F.2d 340; *St. Louis-San Francisco R. Co. v. King*, 368 P.2d 835. None of these cases are in point.

In the *Blair* case the plaintiff was moving a 1,000 pound steel tube assisted by two men, 60 and 68 years of age, each of which was unfamiliar with the work. Plaintiff suggested that the movement be made with equipment, but the foreman rejected the suggestion and told plaintiff to proceed. In *Bourquet* the plaintiff was doing work customarily assigned to two men. *Davis* dealt with the question of inexperienced help. In the *Welch* case plaintiff was performing work in moving rails without assistance customarily furnished to him. *King* involved an injury sustained by an employee engaged in moving a heavy metal bar without assistance which he had previously requested from the railroad company.

There is no evidence or claim that the crew was insufficient in number or experience to enable it to safely perform the work of closing the open joint.

With the report of an open joint on its main line and the knowledge that six high-speed trains would be required to pass during the night, respondent was confronted with an emergency situation. Assuming, arguendo, that the need for more help had been shown, the evidence is that all available help was employed to do the work. None of the cases cited by petitioner charge a railroad company with negligence in failing to provide unavailable help in an emergency situation. Though the duty to provide sufficient help is primary, nondelegable and continuous, it is still a "duty to exercise reasonable care." *Patton v. Texas & P. R. Co.*, 179 U.S. 658, 21 Sup. Ct. 275; *Bailey v. Central Vermont R. Co.*, 319 U.S. 350, 63 Sup Ct. 1062; *August v. Texas & N. O. R. Co.*, 265 S.W.2d 148. The employer is bound to exercise "reasonable care" and make "reasonable effort" (commensurate with the danger) to furnish sufficient men to do the job. The railroad company is not a guarantor or an insurer in this area. (See cases cited, supra.) In light of this test,

what could and should the railroad have done? All available sectionmen in the area were put to work. What more can be reasonably required?

But, even assuming that additional help was necessary in order to hasten the repair and that petitioner was negligent in failing to provide the same, there still remains the question as to whether or not the lack of additional help was a proximate cause of petitioner's frostbite. We find no evidence to warrant a finding in favor of petitioner on this issue.

(4) Respondent's foreman was not negligent in his supervision of the crew and direction of the work.

Petitioner is an adult with 16 years' experience as a sectionman (R. 21, 44). He has worked on the same section for all of his 16 years' experience and has lived in Green River virtually all of that time (R. 22). In closing the open joint he was doing the same work which he had done on many prior occasions (R. 44). In the words of petitioner's statement, it was "nothing for me to go working in extremely cold weather with my gang under Foreman J. G. Chronopoulos. . . . Many times we worked overtime for longer periods of time than this one, and . . . we were called for such work in even colder weather than this time. . . . I knew we might be gone for many hours . . ." (Ex. 1-D, R. 52, 139. See also R. 72.)

The section foreman, J. G. Chronopoulos, had worked with petitioner at Green River during all of the time that petitioner had worked there (R. 98).

At the time he sustained his injury petitioner was dressed the same as he had been on prior occasions (R. 73, 109). The foreman testified that in his opinion, petitioner never did dress warm enough for the cold weather (R. 109).

The foreman felt this way about petitioner's attire on the night of January 2 (R. 108) and he testified that he told petitioner when petitioner reported for work that "he ought to have more clothes on" (R. 108). Petitioner denied that the foreman made any such comment to him (R. 55). Petitioner clothed himself with what he considered to be adequate in light of his 16 years' experience. Both petitioner (R. 56, 69) and the foreman (R. 108) considered the responsibility of providing adequate clothing for petitioner's individual needs to be with petitioner.

Counsel for petitioner argue dramatically about the conduct of the foreman in requiring the crew to work "throughout the night" under temperatures "hovering near zero" on a "windswept" plain "without a single break" (Page 15, Petitioner's Brief). It is true that the crew worked an overtime shift on a cold January night to repair an open joint. There was no evidence that this was an extraordinary or unnecessary occurrence. On the contrary, this was the very job for which these men were paid. This is the very type of work which their employment contemplated. Contrary to counsel's representation of the evidence, the work was not performed "without a single break." Petitioner's own testimony establishes that travel time to and from the repair site consumed about 1¾ hours (R. 37, 63); that he spent about a half hour in the truck at the repair site (R. 64); that three breaks were taken during the actual work shift when the men warmed themselves by the fire while trains passed (R. 35, 68), and that in addition the men took breaks in turn to warm themselves by the fire (R. 68).

Also contrary to fact is counsel's statement that the foreman knew that petitioner "was in the process of suffering injury from overexposure" (Page 16, Petitioner's Brief). There is no such evidence in the record. The state-

ment that a hand (glove) is frozen to a wrench does not carry with it notice that frostbite has or is occurring. The significant fact is that petitioner at the time he made such statement probably had notice of the danger of frostbite by the "burning, tingling sensation" he felt (R. 36), *but he did not communicate this information to the foreman.* Instead, according to his testimony, petitioner continued to work without complaint or suggestion for relief or care. The evidence does not show that the foreman had knowledge or notice of petitioner's peril. *The record does show that petitioner (who was in the best position to know) had notice of the peril, but said nothing about it, and according to his testimony, continued to work another four hours without complaint.*

Petitioner's counsel have made a list of so-called "safeguards" apparently conceived by them after hours of serious reflection in the preparation of this lawsuit (Page 16, Petitioner's Brief). It is urged that the foreman, having failed to conceive of or observe these "safeguards," was, as a consequence, guilty of negligence. As the railroad views it, the circumstances did not require any of the steps suggested by petitioner's counsel.

The suggestion that petitioner should have been sent home for more clothing fails to consider the fact that the railroad had no duty to clothe the petitioner or to presume the right to insist that he be clothed in accordance with a particular foreman's views. This argument also fails to consider the fact that petitioner and the foreman had been working together for 16 years and (notwithstanding the foreman's doubts) petitioner's clothing had, on prior occasions, always been sufficient for his needs.

By the contention that petitioner should not have been sent 300 yards to get the truck, it is implied that the walk to the truck and return in the heated cab in some way con-

tributed to petitioner's frostbite. There is no such evidence in the record, nor is such an inference warranted from any evidence offered or received. On the contrary, the walk to the truck and the interval in the cab would probably provide more stimulation and protection than holding a light or pushing on a steel bar in the course of closing the joint.

Nor is there any basis for the argument that petitioner should have been sent to a place of "warmth and safety" at midnight. The comment about the hand and wrench was not such as to give notice to respondent of the peril of frostbite. As already pointed out, petitioner may have had such notice but he failed to communicate it to the foreman. Petitioner made no complaint. Furthermore, the foreman testified that he *did* tell petitioner about midnight to get into the cab of the truck, and petitioner has not denied this (though he denies that he actually got into the truck).

The suggestion that another crew should have been called has already been discussed.

For reasons previously stated, postponement of the final repair operation would have been contrary to the public safety and convenience in the operation of the railroad.

Counsel's final "safeguard," i.e. that the crew should have been taken to Green River for a break is neither reasonable nor practical. The travel to and from Green River and time consumed during the break would have prolonged the work shift another 2 to 3 hours, and petitioner would have spent an additional two hours in the back of the truck thereby increasing the actual time of his exposure to the weather.

It is respectfully submitted that there is no evidence of negligence on the part of the foreman.

POINT II.

PETITIONER'S CONDUCT WAS THE SOLE CAUSE OF HIS INJURY.

Petitioner takes exception to the comment of the State Supreme Court "that it was the plaintiff's own conduct . . . that resulted in this regrettable injury." To show error in the State Court's comment that petitioner's conduct was the "sole cause," petitioner's counsel have quoted a part of a paragraph from the case of *Grand Trunk Western Railroad Company v. Lindsey*, 233 U.S. 42, 34 Sup. Ct. 581, 58 L. Ed. 838 (1914), and in doing so have omitted a significant part of the opinion immediately following that quoted, which reads:

> "It is only when plaintiff's act is the sole cause — when defendant's act is no part of the causation — that defendant is free from liability under the act."

If petitioner's conduct was the "sole" cause, respondent is not liable even had it been negligent. This is just another way of saying that defendant must be shown responsible for a negligent act or omission which was a proximate cause of the injury.

In view of the State Supreme Court's determination that there was no evidence of employer negligence, it was unnecessary to the decision on appeal to evaluate petitioner's conduct. But the State Court comment that "plaintiff's own conduct" was the cause of injury is irrefutably supported by the evidence.

Petitioner's counsel urge that the foreman and petitioner "were in a precisely equal position to observe conditions and to appreciate the danger from overexposure" (Page 30, Petitioner's Brief). This statement is incorrect. Petitioner himself testified that he was in the best position to know his own need for clothing and that he alone knew

when he was cold enough to require the warmth of the fire (R. 68, 69). His testimony in this regard is just common sense. But, petitioner failed to provide sufficient clothing, and the extent of his exposure to the cold was a matter entirely within his control. He was not required to remain exposed to the cold any longer than he chose. There was no evidence that he had instructions or felt any moral compulsion to "take turns" at the fire. The foreman said that the men went to the fire when they got cold (R. 113), and petitioner testified that he was free to go to the fire whenever he wanted and that he was the best judge of his own need for the warmth of the fire (R. 68). Reason does not require the railroad company to advise the petitioner when he has become "too cold" and when he should seek shelter and warmth.

Lastly, *petitioner had apparent notice of his own peril about midnight when he felt a tingling and burning sensation in his fingers* (R. 109, 110). *Notwithstanding this, he failed to report this condition to the foreman and, according to his testimony, voluntarily continued his work to the end of the work shift.* The evidence is compelling that petitioner's own conduct (negligent or otherwise) was the cause of his injury.

POINT III.

THE SUPREME COURT OF UTAH DID NOT REVIVE THE DOCTRINE OF ASSUMED RISK.

Counsel for petitioner argue that the Utah Supreme Court has resurrected the doctrine of assumed risk. Their contention is founded upon statements in the State Court opinion that "neither party can be blamed for the cold weather" and that "plaintiff himself was in the best position to know about the sufficiency of his clothing." From these statements counsel infer that the Utah Court has held that

"any risk of injury from overexposure is assumed by petitioner" and that "any risk of injury from inadequate attire is assumed by petitioner" (Pages 32 and 33, Petitioner's Brief). There is a big gap between the language of the State Court opinion and the twisted construction placed thereon by petitioner's counsel.

In commenting that neither party can be "blamed for the cold weather," the State Court properly concluded that employer fault or negligence could not be predicated upon weather conditions. The further statement that petitioner "was in the best position to know about the sufficiency of his clothing" is a comment on his own conduct as it bears upon the accident. There is not the slightest suggestion that petitioner's recovery is barred because he is held to have assumed any risk presented by negligence on the part of respondent.

The basis of the opinion of the Utah Supreme Court is set forth as follows: (372 P.2d 3, 7)

> "Notwithstanding the broad prerogatives of the jury in this case in determining the standard of reasonable care, where it appears that the railroad acted in good faith and exercised its judgment as to the proper course to follow; and there is no evidence of failure to use reasonable care in doing so, the jury cannot be allowed to second guess the judgment of management and impose liability upon the railroad simply because a mishap such as the one of concern here occurred."

Respondent respectfully submits that the foregoing analysis is sound and fair and in line with the principles laid down by the United States Supreme Court.

CONCLUSION

The opinion of the Supreme Court of Utah reflects a conscientious effort to canvass the facts in light of the decisions of the United States Supreme Court. The conclusion that there is no evidentiary basis for a finding of employer negligence finds support in the record before this Court. The decision of the Utah Supreme Court should be affirmed.

Respectfully submitted,

DENNIS MCCARTHY
CLIFFORD L. ASHTON
GRANT MACFARLANE, JR.

Counsel for Respondent